



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/18791/2016

THE IMMIGRATION ACTS

Heard at Field House
On 25 June 2018

Decision & Reasons Promulgated
On 11 July 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE ESHUN

Between

MRS YALINI THAYAPARAN
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr N O'Brien, Counsel
For the Respondent: Mr E Tufan, HOPO

DECISION ON ERROR OF LAW

Decision on Error of Law

1. The appellant has been granted permission to appeal the decision of First-tier Tribunal R Sullivan in which she dismissed the appeal of the appellant against a decision of the respondent to refuse her leave to remain on Article 8 human rights grounds.
2. The appellant is a citizen of Sri Lanka born on 22 August 1988. She first landed in the UK on 26 September 2009 with leave to enter as a Tier 4 (General) Student valid to 29 February 2012. According to the immigration history as set out by the Home Office, the appellant was subsequently granted an extension of stay in the UK until 21 December 2015 as a spouse.

3. As the Home Office immigration history omitted vital information in its refusal letter, I set out that information as provided in a previous decision by First-tier Tribunal Judge Hodgkinson promulgated on 24 April 2013. He states under “relevant immigration history” that on 29 February 2012 an application was submitted on behalf of the appellant for leave to remain on grounds of her marriage to the sponsor, Mr Kanapathipillai Thayaparan. The application was refused on 14 November 2012. The appellant appealed the Secretary of State’s decision which resulted in the appeal which was heard by FtTJ Hodgkinson on 16 April 2013.
4. As part of the respondent’s reasons for refusing her application on 14 November 2012, the respondent indicated that the appellant had not satisfied the requisite English language requirement as she had not submitted the relevant certificate to confirm that she had successfully completed an English language course at Portsmouth College. At paragraph 10 of his determination Judge Hodgkinson stated that the appellant had now submitted the relevant English language certificate with her grounds. She took the test in February 2012 and indicated in her application form that she was awaiting the result at that stage.
5. At paragraph 34 Judge Hodgkinson, based on his findings of facts, said it was clear the appellant would be able to satisfy paragraph 319L(i)(a). This was because he had the relevant English language test certificates relating to the appellant, with regard to speaking, writing, listening and reading, which certificates would appear to have been previously before the respondent, which indicated that on 22 and 24 February 2012 the appellant had passed each of those four categories to the requisite standard. The HOPO before him, Mr Chaudri, did not seek to challenge this conclusion.
6. Judge Hodgkinson went on to allow the appellant’s appeal on human rights grounds. It would appear that as a result of Judge Hodgkinson’s decision, the appellant was granted an extension of stay in the UK until 21 December 2015 as a spouse.
7. On 10 December 2015 the appellant applied for leave to remain on human rights grounds. The respondent refused this application on 21 July 2016 on the basis that in 2012 the appellant had relied on a false English language certificate to gain leave to remain in the United Kingdom as a spouse. Consequently, her presence in the United Kingdom was not conducive to the public good as she did not satisfy paragraph S-LTR.1.6 of Appendix FM. The respondent stated that there were no significant obstacles to the appellant’s reintegration in Sri Lanka and no exceptional circumstances to justify a grant of leave outside the Rules. The respondent has accepted that the appellant has a qualifying relationship with her husband and there are insurmountable obstacles to life continuing between them outside the United Kingdom. The reason being that the sponsor was a refugee in the UK and at the time had leave until 4 October 2015. He could not return to Sri Lanka and could not be expected to do so.
8. I will start by considering Judge’s Sullivan’s findings on Article 8. I find that the grounds disclose an error of law in her disposal of the Article 8 enquiry. I find that the judge misdirected herself in law in finding that the status of the appellant’s husband was uncertain. As already stated above, the husband had been granted refugee status in the United Kingdom. He was a refugee until 4 October 2015. As he had made an

application for indefinite leave to remain before his leave expired, he was covered by Section 3C of the Immigration Act 1971 which extended his leave until the respondent made a decision on his application. I find that his status was not uncertain. He remained a refugee until the Secretary of State determined his application for indefinite leave to remain.

9. I further find that it was unreasonable for the judge to conclude in all the circumstances that the appellant's removal from the UK would amount to a proportionate interference with her and her family's Article 8 rights. The appellant and her husband have a son who was born on 12 May 2015. I find that the judge erred in questioning the father's involvement in the child's upbringing on the basis of an absence of evidence. It was accepted by the Secretary of State that there was a relationship between the appellant and her husband. If the judge was going to go behind matters which had been accepted by the Secretary of State, it fell to the judge to put these matters to the appellant to enable her to address them. The judge's failure to do so amounted to an error of law.
10. There was a further error of law committed by the judge in her finding that the appellant has not provided evidence of her own financial circumstances or those of her husband. The appellant provided this evidence with her FLR(O) application. Indeed, the respondent did not raise any issue with the appellant's financial circumstances.
11. I now turn to consider the judge's approach to the respondent's refusal to grant her leave to remain on the basis that the appellant had submitted a false TOEIC test certificate and had used this to secure leave to remain in 2012.
12. It can be seen from Judge Hodgkinson's decision that the Secretary of State did not raise an allegation that the TOEIC test result was fraudulent. Indeed, the judge had found that the results were genuine, and the HOPO before him did not question his finding. Indeed, following that decision the appellant was granted further leave to remain until 2015. It appears that the allegation of forgery must have arisen at a later date, and featured in the refusal of the appellant's subsequent application for leave to remain on human rights grounds.
13. I find that the grounds are right in saying that the legal burden of proving that the appellant used deception lies on the Secretary of State albeit there is a three-stage process. The first stage is for the Secretary of State to adduce sufficient evidence to raise the issue of fraud. In **SM and Qadir** the generic evidence submitted by the Secretary of State was enough to satisfy the initial evidential burden on her. The second stage was for the appellant to raise an innocent explanation which satisfies the minimum level of plausibility. If that burden is discharged, the Secretary of State must establish on the balance of probabilities that the innocent explanation is to be rejected.
14. On this issue I accept Mr O'Brien's submission that the judge dealt with steps 2 and 3 together by putting the burden on the appellant. I also accept his submission that in deciding whether the appellant had raised a plausible innocent explanation, the judge failed to consider material evidence such as an Academic English Level 2 certificate passed at the College of Technology, London on 18 October 2010, a Grade 2 Graded Examination in Spoken English certificate passed at the Trinity College, London on

25 November 2015, a letter from her manager at KFC, where she worked between 2013 and 2014, noting that the appellant had “excellent communication skills” and evidence from Sainsbury’s dated 5 December 2017 which said that the appellant’s role as a counter assistant from 1 July 2014 until end of September 2015 meant that she interacted with customers every day and she had no trouble communicating with the customers and her co-workers. I find that the judge failed to consider this evidence in assessing whether the appellant satisfied the minimum level of plausibility in establishing that she had no reason to engage someone to take the test for her.

15. Mr. O’Brien relied on the grounds that challenged the judge’s conclusion at paragraph 22 that, in arranging for another person take an English language test for her, the appellant’s conduct fell within paragraph S-LTR.1.1 of the Rules. It was submitted that paragraph S-LTR.1.6 deals with criminal conduct, demonstrated from the wording of the Rule itself and by comparison with the deportation provisions. The SSHD’s Immigration Directorate Instruction Family Migration: Appendix FM Section 1.0b states that in addressing suitability criteria under paragraphs S-LTR.1.2 to S-LTR.1.6 of Appendix FM, decision makers must refer to the Criminality Guidance: Criminality Guidance in ECHR Cases. The Criminality Guidance applies to foreign criminals. Mr. O’Brien submitted that the appellant, who has no convictions and has always complied with UK immigration laws, cannot be considered to be a foreign criminal. The appellant has not engaged in conduct which falls within immigration rule S-LTR.1.6. Mr. O’Brien argued that the judge materially erred by failing to properly consider whether any use of the English language test amounted to conduct that fell within S-LTR.1.6. Further, or alternatively, the judge’s conclusion was unreasonable in light of the SSHD’s own guidance and wording of the rule.
16. I did not find the argument persuasive because in my opinion S-LTR.1.6 catches the group of people who do not have criminal convictions and therefore do not fall within paragraphs S-LTR.1.3 to 1.5. Paragraph S-LTR.1.6 refers to conduct, character, associations or other reasons which make it undesirable to allow such a person to remain in the UK. Therefore, in my opinion the appellant does not have to have a criminal conviction to be excluded from the application of S-LTR.1.6.
17. My opinion should not exclude further discussion on the application of S-LTR.1.6 as the determination of the appellant’s alleged conduct will feed into the Article 8 consideration.
18. Consequently, I find that the judge’s decision cannot stand. It is set aside in order to be remade on all issues.
19. The appellant’s appeal is remitted to be reheard by a judge other than Judge R Sullivan.

No anonymity direction is made.

Signed

Date: 5 July 2018

Deputy Upper Tribunal Judge Eshun